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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

**No. 339**

**THE KNOTT CORPORATION,**

*Petitioner,*

*vs.*

**MARY HALE FURMAN**

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE FOURTH CIRCUIT, AND BRIEF IN SUP-  
PORT THEREOF.**

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SUPREME COURT OF THE UNITED STATES

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**No. 339**

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THE KNOTT CORPORATION,

*Petitioner,*

*vs.*

MARY HALE FURMAN.

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**PETITION FOR A WRIT OF CERTIORARI**

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*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioner, The Knott Corporation, a corporation, respectfully prays that a writ of certiorari issue to review the action of the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled case in affirming the judgment of the District Court of the United States for the Eastern District of Virginia.

**Jurisdiction**

On October 1, 1946, judgment was entered in the District Court of the United States for the Eastern District of Virginia, at Norfolk, Virginia, for the sum of \$27,000.00 in favor of Mary Hale Furman against your petitioner (R. 88).

On June 16, 1947, Circuit Judges Parker and Dobie, per an opinion by Circuit Judge Parker, affirmed the judgment of the District Court (R. 156). Chief Justice of the United States Circuit Court of Appeals for the District of Columbia, D. Lawrence Groner, sitting in the Fourth Circuit by special assignment, dissented per his dissenting opinion of June 16, 1947 (R. 169). A petition for a rehearing was denied on August 13, 1947 (R. 185).

Jurisdiction to review this case upon a writ of certiorari is expressly conferred upon this Court by Judicial Code, Section 240, as amended (Act of March 3, 1891, c. 517, Section 6, 28 Stat. 828; Act of March 3, 1911, c. 231, Section 240, 36 Stat. 1157; Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938; U. S. C. A. (Title 28, Section 347).

### **Summary Statement of the Issues Involved**

#### **(a) Facts in Re Injury of Mary Hale Furman:**

Mary Hale Furman, wife of a Lieutenant in the U. S. Navy Reserve, occupied room 541, which is located in the west wing of the U. S. Hotel Chamberlin. The hotel, as its name suggests, was owned, and as petitioner will hereinafter show, was operated by the United States Government as wartime housing for Naval and Military personnel and their families. A small fire originated in a wooden locker and the plaintiff, in attempting to lower herself from a window in her room to a roof below, was injured when the rope of bed sheets broke.

Plaintiff alleges that The Knott Corporation was the operator of the hotel and as such operator was responsible for the acts of all employees of the hotel. She alleges that servants of the hotel were responsible for the fire; that no alarm was sounded; that she was not warned that the fire was minor and presented no danger; that doors of a stairway in her wing of the hotel were left open which permitted

smoke to flood the wing of the hotel in which her room was located; that there was delay in fighting the fire; that the fire-fighting equipment was obsolete and inadequate; that the hotel employees were not instructed in the use thereof; that no fire drills were held; that the locker contained inflammable materials and was a fire hazard and that it was negligently located beneath a stairway which was reserved for the escape of guests in a fire emergency. The defendant denied that it was the operator of the hotel and denied all allegations of negligence.

#### **Trial Facts**

(b) The trial court ruled as a matter of law that petitioner was the operator of the hotel and refused to submit that issue to the jury. Over defendant's objection, the trial court submitted to the jury for their determination whether petitioner was negligent in any one of the numerous allegations of negligence hereinbefore mentioned, and the jury in a general verdict, which was affirmed by the Appellate Court, awarded the plaintiff \$27,000.00.

#### **Facts in Re Appeal**

(c) The jurisdictional basis of this action is diversity of citizenship. Appellee is a citizen of the State of Massachusetts, and the petitioner is a Delaware corporation with principal offices in the City of New York, and not domesticated in, or doing any business in Virginia. The petitioner appeared specially and filed motions to dismiss on the ground that it was not a citizen of, or domiciled in or engaged in business in the State of Virginia; that the cause of action did not arise within the jurisdiction of the State of Virginia, but on the Government reservation; that the statute authorizing the institution of action in a Federal Court on the ground of diversity of citizenship provides

that suit be brought either at the residence of the defendant or petitioner, and therefore the District Court of the United States for the Eastern District of Virginia, did not have either jurisdiction or venue; that applicant had no servants or agents within the jurisdiction of the State Court on whom service could be had, and that service of process on this occasion was invalid. These pleas and motions were overruled by the Court, to which action of the Court the petitioner duly excepted (R. 15, 17).

The United States Hotel Chamberlin was owned by the United States Government, but Mrs. Furman alleged that it was operated by petitioner as an independent contractor, and that petitioner was responsible and chargeable with any and all negligent acts of the servants in the hotel. A contract in writing between the United States Government and petitioner was alleged in the complaint as showing that petitioner was the operator of the hotel. Petitioner thereupon filed a copy of said contract with the demurrer setting up that the contract showed on its face that the petitioner was not the operator of the hotel, and was not responsible for the acts of the servants of the hotel. This demurrer was overruled by the District Court. During the trial petitioner sought to introduce testimony and evidence to prove that the hotel was operated by the United States Government, and not by petitioner. At first the District Judge refused to permit the petitioner to introduce any oral testimony on this issue, holding that the written contract conclusively established the petitioner to be the operator of the hotel, and that the written contract could not be contravened by oral testimony (R. 16, 17, 56, 71). Later in the trial the District Judge for the purpose of the record only, permitted the petitioner's testimony in this connection to be introduced, but still ruled, however, that the petitioner could not be permitted by oral testimony to vary or alter the

terms of the written contract and then later on struck out all of the testimony and charged the jury that as a matter of law the petitioner was the operator of the hotel, and as such responsible for any negligent acts of the hotel employees (R. 56, 57, 71). Furthermore the District Judge refused to submit the written contract (R. 71, 74) to the jury to be considered by them together with the testimony of the witnesses, holding that the construction of the contract was a matter of law to be determined by the Court alone.

During the trial various objections and exceptions to rulings of the District Judge were made, and at the completion of plaintiff's evidence and all of the evidence of the petitioner (R. 71, 87), petitioner moved for a directed verdict. Those motions (R. 71, 87, 88) were overruled.

Numerous requests for instructions were submitted by Mrs. Furman and by petitioner (R. 85) to be incorporated in the District Judge's charge to the jury, and numerous objections were made and exceptions taken to the action of the District Judge in charging the jury erroneously, and in failing to charge the jury as requested in various requests for instructions offered by petitioner. After the verdict of the jury, the petitioner moved the Court to set aside the verdict, but that motion was overruled and judgment was entered for Mrs. Furman on October 1, 1946.

### **Questions Presented**

1. Was it erroneous for the Circuit Court of Appeals below to hold that acts done on the Fortress Monroe Military Reservation are within the jurisdiction of the State of Virginia?

2. Was it error for the courts below to hold that there was a waiver of venue and proper service of process?

33. Was it error for the courts below to find and hold that as a matter of law petitioner operated the hotel?

4. Did the trial court err in excluding from the jury (and did the majority of the Circuit Court of Appeals below, err in sustaining the ruling of the trial court), evidence which proved that the hotel was not operated by petitioner, but was in fact wholly and solely operated by the United States Government?

#### **Reasons Relied On for the Allowance of the Writ**

Your petitioner advances the following reasons why this Honorable Court should grant the prayer of this petition.

#### **First Reason**

The majority of the Circuit Court of Appeals below, there being a dissenting opinion by Chief Justice D. Lawrence Groner of the United States Circuit Court of Appeals for the District of Columbia, held that a foreign corporation which was carrying out a government contract solely on a Government Military Reservation was doing business in the State of Virginia.

This holding is directly in conflict with the previous decisions of this Court in the following cases:

*Standard Oil Co. v. California*, 291 U. S. 242 (1934);  
*United States v. Unzenta*, 281 U. S. 138 (1930);  
*Arlington Hotel Co. v. Fant*, U. S. 278, 439 (929);  
*Pacific Coast Dairy v. Dept. of Agriculture of California*, U. S. 318, 285 (1943);  
*Stewart & Co. v. Sadrakula*, U. S. 309, 94 (1940);  
*Collins v. Yosemite Park Co.*, U. S. 304, 518 (1938);  
*Murray v. Gerrick*, U. S. 291, 315 (1934).

The decision of the majority of the court below is also contrary to the holding of the Supreme Court of Appeals of Virginia in

*Bank of Phoebus v. Byrum*, 110 Va. 708, 67 S. E. 349.

### Second Reason

The majority of the Circuit Court of Appeals below in their decision held that under *Neirbo Co. v. Bethlehem Shipbuilding Corporation*, 308 U. S. 165, petitioner, under Section 3846 (a) of the Virginia Code, which provided that a corporation doing business in the State of Virginia which failed to file a written power of attorney with the Secretary of the Commonwealth should by "doing business" in the State of Virginia, "be deemed" to have appointed the Secretary of the Commonwealth its agent upon whom process could be served, waived the privilege of venue provided by Section 51 of the Federal Judicial Code (U. S. C. A., Title 28, Section 112).

This ruling of the majority of the court below is in direct conflict with the following decisions of the United States Circuit Court of Appeals for the second, third and ninth circuits in the following cases:

*Moss v. Atlantic Coast Line R. Co.*, 149 Fed. (2d) 701, (C.C.A. 2d, 1945);

*Robinson v. Coos Bay Pulp Corp.*, 147 Fed. (2d) 512 (C.C.A. 3rd, 1945);

*Cummer-Graham v. Straight Side Basket Corp.*, 136 Fed. (2d) 828 (C.C.A. 9th, 1943).

### Third Reason

The majority of the Circuit Court of Appeals below in its opinion held that the evidence showed as a matter of law, that petitioner operated the United States Hotel Chamberlin located on the Fortress Monroe Military Reservation.

This is in direct conflict with all the evidence introduced in the case. The only evidence introduced in this connection was introduced by petitioner, and not by plaintiff. All of petitioner's evidence showed the hotel was operated by the United States Navy, "lock, stock and barrel."

#### Fourth Reason

The trial judge prior to the trial of the case ruled as a matter of law, that the written contract (R. 15, 74) showed petitioner to be the operator of the United States Hotel Chamberlin. He at first refused to permit petitioner to introduce any testimony which would show that the actual operator was not petitioner, but was the United States Navy, and gave as his reason for such ruling that oral testimony could not be introduced to vary or alter the terms of the written contract. Finally, to vouch for the record only, the trial court permitted petitioner to introduce its evidence in this connection, and then charged the jury (R. 56, 74) that this evidence was not to be considered by them, as the court had already ruled as a matter of law, that petitioner was the operator of the hotel, and was responsible for all acts of negligence committed by any of the hotel employees. The majority of the Circuit Court of Appeals below sustained the trial court in this ruling, and their reason for so doing was stated in their opinion to be "the evidence shows conclusively that plaintiff was operating the hotel."

The ruling of the trial court that oral testimony could not be introduced to vary or alter the terms of the written instrument is in direct conflict with all of the authorities which are to the effect that the parole evidence rule applies only between parties to the instrument and does not apply to a third person (See 32 *Corpus Juris Secundum*, Section 861, Evidence, and cases there cited, also *Gulf Refining Co. v. Brown*, 93 Fed (2d) 870 (C. C. A. 4, 1938), opinion by Judge Soper, the court being constituted of Circuit Judges Parker and Northcott and Soper).

When it is understood that the only testimony introduced was that of petitioner, and that the trial court sustained the objections of plaintiff's counsel and only permitted the petitioner's evidence to go in for the purpose of vouching the

record, it will be seen that there can be no reasonable basis for the conclusion announced by the majority of the court below. In fact, the majority of the court below admit (R. 158) " \* \* \* The defendant was restricted in many ways in the operation of the hotel. \* \* \* "

From the foregoing it will thus be seen that, to say the very least, there was a strong conflict in the evidence with reference to the operation of the hotel, and that issue should have been submitted to the jury as an issue of fact for the jury's determination.

#### **Prayer for Writ of Certiorari**

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of your Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit requiring that court to certify and send to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the Record and proceedings in the case No. 5589, and entitled *The Knott Corporation, appellant, v. Mary Hale Furman*; and that the action of the said United States Circuit Court of Appeals for the Fourth Circuit as announced in its decision dated June 16, 1947 affirming the judgment of the District Court of the United States for the Eastern District of Virginia entered by said court on October 1, 1946, may be reversed by your Honorable Court, and that your petitioner may have such other and further relief in the premises as may be just. And your petitioner will ever pray, etc.

HARVEY E. WHITE,  
E. L. RYAN, JR.,  
F. M. SCHLATER,  
EDWIN C. KELLAM,  
JOHN W. OAST, JR.,  
*Counsel for Petitioner.*

**Certificate**

I hereby certify that I am a member of the bar of the Supreme Court of the United States; that I am of counsel for The Knott Corporation, the petitioner herein; that the foregoing petition has been prepared in accordance with the request of the petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; that said petition is not made for the purpose of delay or prolongation of litigation; and that in my opinion said petition is well founded in law and in fact, and should be granted.

JOHN W. OAST, JR.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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No. 339

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THE KNOTT CORPORATION,

v.

MARY HALE FURMAN

*Petitioner,*

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF  
CERTIORARI**

The facts in this case, the proceedings had in the courts below, the jurisdictional statement, the questions presented and the reasons why a writ of certiorari should be granted, having been set out in the petition for a writ of certiorari, will not, in the interests of brevity, be here repeated.

**Specifications of Error**

1. It was error for the majority of the Circuit Court of Appeals below to hold that acts done on the Fortress Monroe Military Reservation are within the jurisdiction of Virginia.

2. It was error for the courts below to hold that there was venue and proper service of process.

3. It was error for the courts below to find and hold that as a matter of law petitioner operated the hotel.

4. It was error for the trial court to exclude from the jury (and for the majority of the Circuit Court of Appeals to sustain the ruling of the trial court), evidence which proved that the hotel was not operated by petitioner, but was, in fact, wholly and solely operated by the United States Government.

#### POINT I

#### **Acts Done on the Fortress Monroe Military Reservation Are Not Within the Jurisdiction of the State of Virginia**

In the language of the majority of the court below :

“We come, then, to the question as to whether the application of the statute is different because the business done was on the Fort Monroe Military Reservation. We do not think so. \* \* \* The land contained in the Reservation was ceded by the State of Virginia to the United States by Act of March 1, 1821, which contained the following provision :

“\* \* \* that the cession shall not be construed or taken so as to prevent the officers of the State from executing any process or discharging any legal functions within the jurisdiction or territory herein directed to be ceded.”

“If this provision means anything, it means that the laws of the State of Virginia with reference to the service of process run throughout the reservation. This means, of course, not only that state officers may go upon the Reservation to serve process, but also that the state laws as amended from time to time will determine what acts on their part constitute service. \* \* \* If it could do this, there is no reason why its general laws with reference to service on foreign corporations should not be held applicable to foreign corporations doing business within the Reservation.”

The foregoing quotation seems to indicate that the majority of the court below has confused service of process

with jurisdiction. The issue is not whether state officers had the right to serve process on the Reservation, but whether doing business on the Reservation is equivalent to doing business in the State of Virginia.

The Supreme Court of Appeals of the State of Virginia, has expressly disclaimed any jurisdiction over the Fortress Monroe Military Reservation, and for the State of Virginia has held just the contrary to what the majority of the Circuit Court of Appeals below now seeks to hold. In *Bank of Phoebus v. Byrum*, 110 Va. 708, 67 S. E., 349, the facts were that Byrum, who was born in North Carolina, enlisted in the Army at Fortress Monroe and was stationed there for 12 years. An attachment was sued out and levied on effects belonging to Byrum, and the lower court sustained a motion to quash the attachment on the ground that Byrum was a resident of the State of Virginia, and was not a non-resident as alleged in the attachment. The Supreme Court of Appeals reversed the lower court decision and in its opinion cited the case of *Ft. Levenworth R. Co., v. Lowe*, 114 U. S. 525, 29 L. Ed. 264, 5 Sup. Ct. 995.

“ \* \* \* The reservation which has usually accompanied the consent of the states civil and criminal process of state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them.  
\* \* \* ”

Continuing, the Virginia Supreme Court of Appeals said:

“For the foregoing reasons we are of the opinion that the defendant in error did not acquire a residence in the State of Virginia by reason of having enlisted in the Army of the United States and resided as such enlisted soldier at Fortress Monroe. \* \* \* ”

The claim of the majority of the court below that a state ceding the land comprising a federal reservation can sub-

sequently enact legislation affecting the reservation, was ruled erroneous in the case of *Arlington Hotel v. Fant, et al.* 278 U. S. 439 (1929) where it was held that an Arkansas statute passed subsequent to the acquisition of the land comprising the reservation was without force so far as the reservation was concerned.

Fortunately the very point at issue has already been decided in the case of *Standard Oil Co. v. California*, 291 U. S. 242 (1934). In that case the State of California levied a license tax upon every distributor for each gallon of motor vehicle fuel "sold and delivered by it in this state." The Standard Oil Company, a foreign corporation, qualified to do business in California, sold and delivered to the post exchange within the Presidio of San Francisco, 420 gallons of gasoline. It carried this to the exchange's place of business in barrels or by tank trucks. The State demanded of the corporation 3¢ per gallon upon the gasoline so sold and delivered, and payment being refused the suit followed. As in the case at bar, the land comprising the military reservation was ceded by the State of California to the United States with the reservation, "that this State reserves the right to serve and execute on said land, all civil processes not incompatible with this cession, and such criminal processes as may lawfully issue under the jurisdiction of this State against any person or persons charged with crimes committed without said land."

In its opinion the court said:

"In three recent cases—*Arlington Hotel Co. v. Fant*, 278 U. S. 439, 49 S. Ct. 227, 73 L. Ed. 447, *United States v. Unzeuta*, 281 U. S. 138, 50 S. Ct. 284, 74 L. Ed. 761, and *Surplus Trading Co. v. Cook*, 281 U. S. 647, 50 S. Ct. 455, 74 L. Ed. 1091—we have pointed out the consequences of cession by a state to the United States of jurisdiction over lands held by the latter for military purposes. Considering these opinions, it seems plain that by the act of 1897 California surrendered every

possible claim of right to exercise legislative authority within the Presidio—put that area beyond the field of operation of her laws. Accordingly, her Legislature could not lay a tax upon transactions begun and concluded therein.”

“The principle approved in those cases applies here. A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States.”

The majority opinion of the Circuit Court of Appeals below is in direct conflict with the decisions of this Court and of the Supreme Court of Virginia, *supra*. It will be noted that although the majority of the court below has cited numerous authorities for all of its holdings in the other matters referred to in the opinion, it is not without significance that it has failed to cite a single authority in support of its views, or to distinguish or comment on any of the authorities herein cited, although all of these authorities were contained in petitioner's original brief, and/or are cited and referred to by Chief Justice Groner of the Supreme Court of Appeals for the District of Columbia in his dissenting opinion below.

Although there was no evidence on the subject and although the majority of the court below throughout its opinion has made no reference to petitioner doing business anywhere else than on the Fortress Monroe Military Reservation, during the course of its discussion, they make the following remark:

“Corporations doing business on a reservation *may* come in contact with the citizens of Virginia and do business with them in the same way as foreign corporations doing business elsewhere within the state.”  
• • • (*Italics supplied*).

Petitioner suggests that here the majority of the court below has reached a conclusion based on an assumption,

rather than on evidence, and that the court could just as reasonably draw the same inference with respect to all corporations located in a state or territory contiguous to or near the boundary line of Virginia.

Furthermore it is an undisputed fact that the petitioner here was performing a contract let by the government as a part of its war effort and there certainly does not exist any power of the State of Virginia, by any law, to interfere in any way with its war effort on its own military reservation and over which it has exclusive jurisdiction. In *14-A Corpus Juris*, page 1256 it is said:

“So every corporation of any state in the employ of the United States has the right to exercise the necessary corporate powers and to transact business requisite to discharge the duties of that employment in every other state in the Union without permission granted, or *conditions imposed by the latter.*”

In the case of a *Mercantile Trust Co. v. Texas & P. Ry. Co.*, 216 Fed. 225, the court said:

“It is clear that when Congress has the power, under the Federal Constitution, to adopt and use, for the convenience of the operations of the federal government, a corporation of *any kind* as its agency, in such a case a State Legislature cannot, *in any manner*, interfere with the operations of such agency so employed by Congress for federal government purposes. The states cannot deny these federal corporations the right to enter the states, or do business in the states. Neither can they announce conditions for non-compliance with which the federal corporations will be excluded from the states. *And it is inconceivable that the state could exclude from their borders the federal corporations used as government agencies when those corporations decline to surrender their rights to litigate in the Federal Courts.*” (Italics supplied).

See also:

*Pullman Co. v. Kansas*, 216 U. S. 56;  
*Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28;  
*Hooper v. California*, 155 U. S. 648;  
*Horn Silver Mining Co. v. New York*, 143 U. S. 305;  
*Pembina Consol. Silver Co. v. Penna.*, 125 U. S. 181;  
*Packet Co. v. James*, 32 Fed. 21;  
*Stockton v. Baltimore, etc., R. Co.*, 32 Fed. 9.

## POINT II

### **Petitioner Did Not Consent to Suit in Virginia and No Venue Exists**

A motion to dismiss was seasonably made by petitioner when this action was brought in the District Court below. As it was admitted that the plaintiff is a citizen of Massachusetts, and petitioner is a Delaware corporation with its principal offices in New York, it is beyond question that in order to comply with Section 51 of the Judicial Code (Title 28, U. S. C. A. Sec. 112), suit could not be instituted in the U. S. District Court for the Eastern District of Virginia, but would have to be instituted either in Massachusetts or in Delaware; the residence of either the plaintiff or defendant. But plaintiff claimed that under Section 3846(a) of the Code of Virginia, petitioner had waived its right to demand that suit be brought in Massachusetts or Delaware, and that venue in Virginia was proper.

Section 3846(a) of the Code of Virginia in substance, provides that any foreign corporation *doing business in the State of Virginia*, shall by written power of attorney, appoint the Secretary of the Commonwealth its true and lawful attorney for the purpose of service of process, and that

if any such company shall do business in this State without having appointed the Secretary of the Commonwealth its true and lawful attorney as required herein, it shall by doing such business in the State of Virginia, "be deemed to have thereby appointed the Secretary of the Commonwealth its true and lawful attorney for the purpose hereinafter set forth" (R. 16).

Plaintiff claimed that doing business on the Fortress Monroe Reservation was doing business in the State of Virginia, and that the service obtained by plaintiff on the Secretary of the Commonwealth was a valid service and that such doing business constituted a waiver of venue under the diversity of citizenship statute. The courts below sustained the view of the plaintiff and held that petitioner had waived venue and was subject to suit in Virginia. The basis for this rule is the case of *Neirbo v. Bethlehem Shipbuilding Corporation*, 308 U. S. 165, in which it was held that the plea of improper venue "merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election," and the court continuing said:

"\* \* \* Being a privilege it may be lost. It may be lost by failure to assert it seasonably, by formal submission in a cause, or by submission through conduct."

Since petitioner seasonably asserted its plea of improper venue, and did not formally submit to venue in Virginia, the only remaining ground is that of submission through conduct. This is the sole and only claim of venue asserted by plaintiff and if plaintiff's position is tenable, it must rest solely on the Virginia statute, 3846(a) above cited. The claim therefore is and necessarily must be that the petitioner was doing business in the State of Virginia and that this constituted submission to venue "by conduct."

Petitioner has already shown (Point I *supra*) that it was not doing business in Virginia, but for the purpose of this discussion we will assume that petitioner was "doing business" in Virginia.

Prior to *Neirbo v. Bethlehem Shipbuilding Corporation, supra*, it had already been decided, as pointed out in the majority opinion of the Circuit Court of Appeals below, that service of process under state statutes requiring the appointment of an agent for the purpose of service of process constituted valid service. But, as service of process and venue are two separate and distinct things, all of their prior decisions, as pointed out in the dissenting opinion in the *Neirbo* case, held that this did not affect the right of a foreign corporation or non-resident, where suit was brought in a federal court under Section 51 of the federal code to insist on the privilege of venue. The *Neirbo* case, to the extent that where it appeared a foreign corporation had filed consent to suit as required by a state statute, modified these previous decisions and held that consent to suit was equivalent to a waiver of venue in a federal court and that the foreign corporation was estopped to plead improper venue.

Since the *Neirbo* decision, the lower courts have not been uniform in deciding just how far that decision went. In the two non-resident motorist cases of *Kreuger v. Hider*, 48 Fed. Supp. 708, and *Steele v. Dennis*, 62 F. Supp. 73, two District Courts in the Fourth Circuit carried the *Neirbo* case a step further and held that the State statutes providing that the privilege of the use of the State's highways should be deemed a consent to be sued and providing for service on a statutory agent, constituted a constructive or implied waiver of venue under Section 51 of the Federal Code.

In the case of *Moss v. Atlantic Coast Line R. Co.*, 2 Cir.,

149 F. (2d) 701, *Cummer-Graham Co. v. Straight Side Basket Corp.*, 9 Cir., 136 F. (2d) 828; *Robinson v. Coos Bay Pulp Corp.*, 3 Cir., 147 F. (2d) 512, where the specific question involved was whether service of process under State statutes prohibiting the doing of business unless the statutory agent was first appointed, constituted a waiver of venue, the reverse was held and it was said that only actual consent to be sued could constitute a waiver, as the court in the *Neirbo* case expressly stated that *Re Keasby & Mattison Co.*, 160 U. S. 221, was not overruled.

The majority of the court below adopted the *Kreuger v. Hider*, *supra* and *Steele v. Dennis*, *supra*, cases as being controlling in the case at bar, and attempt to distinguish the *Cummer-Graham Co. v. Straight Side Basket Corp.*, *supra*, and other similar cases, on the ground that in none of the latter cases was there a State statute providing "that the appointment of a State agent for the service of process would be presumed from doing business in the State."

The majority of the court below only refer to subsections 1, 2, 3 of Section 3846(a) of the Code of Virginia and all of these subsections end with the phrase:

"\* \* \* its true and lawful attorney for the purposes hereinafter set forth."

It is therefore necessary to find what are the purposes "hereinafter set forth." Subsection 5 of the statute sets out these purposes as follows:

"\* \* \* any lawful process against or notice to such corporation or company in an action or proceeding against it *growing out of such business* may be served on the Secretary of the Commonwealth, and filing such power of attorney or doing such business in Virginia shall be a signification of its agreement that any such process or notice so issued *shall be of the same legal force and validity as if served upon it in the State of Virginia.*" (Italics supplied.)

It will be observed that under the language of this statute a foreign corporation merely agrees that any process or notice shall have the same force and effect as if served in the State of Virginia. It does not require the corporation to waive any of its rights or defenses that it might have in the matter litigated.

This statute does not support the distinction sought to be made by the majority of the court below. Suppose in the non-resident motorist cases of *Kreuger v. Hider, supra*, and *Steele v. Dennis, supra*, the defendants had been personally served with process, instead of by mail, as provided by the statute. Certainly the personal service of process would be just as effective, if not more so, than service by mail. Now suppose that the non-resident motorists sought to remove their cases to the Federal court on the ground of diversity of citizenship. Can there be any doubt of such right to remove? The majority of the court below agree that removal to the Federal court could be had, and they say:

“Certainly no purpose of justice is served by permitting a defendant to be sued in the State but not the Federal courts in a situation such as this, where the defendant himself unquestionably has the right to remove the case to the Federal courts if sued in the State courts.”

And further on the majority of the Court below say:

“To hold that it should be given effect for one purpose but not for the other would not only be illogical but would result in the anomaly of permitting the defendant to be sued in the State but not in the Federal courts, although all the elements of Federal jurisdiction are present and *although defendant would itself have the right to remove the case into the Federal court if sued in the courts of the State.* (Italics supplied.)

The fallacy of this statement by the majority below is apparent when the ruling of the *Neirbo* case and its implications are given thoughtful consideration, for in speaking of the waiver of venue by consent, Justice Frankfurter said (p. 171):

“The consent therefore extends to *any court* sitting in the State which applies the law of the State.”

This statement of Justice Frankfurter makes it very clear that “the consent” to be sued, is a consent to be sued, in any court of the State, whether such court is a State court or a Federal court, and “the consent” is a waiver of venue and precludes the filing of a plea to the venue. If, therefore, the corporation cannot plead improper venue when sued in a Federal court in the State, neither can the corporation remove the case to a Federal court when sued in a State court. The removal privilege is a venue privilege which may be waived. In fact, it is held to be waived, unless the removal application is seasonably made.

It is clear, then, that “the consent” in the *Neirbo* case was such as to preclude the corporation there from pleading improper venue, whether in removal proceedings or otherwise. But under the wording of Section 3846(a) of the Code of Virginia, no such “consent” is given and therefore under the statute petitioner did not waive venue either in removal proceedings or otherwise, nor did it waive its right to seasonably assert its pleas of improper venue in the original action in the District Court below. If the language of Section 3846(a) would permit the foreign corporation to remove to a federal court, then, necessarily, there is no waiver of venue. If there is no waiver of venue in the removal case, then *a fortiori* there is no waiver of venue in the case at bar, as has been held by the majority

of the court below, because Section 3846(a) (sub-section 5) provides only that the process or notice so issued:

“• • • shall be of the same force and validity as if served upon it in the state of Virginia.”

By analogy with the non-resident motorist cases, suppose a foreign corporation's agent had an accident in the State of Virginia, and proper service was had on the foreign corporation in Virginia, it could unquestionably remove the case to the federal court. Section 3846(a) expressly provides that service has only the same “validity as if served • • • in the State of Virginia,” so unquestionably the corporation could remove to a federal court.

In this connection we quote the dissenting opinion of Chief Justice Groner of the U. S. Circuit Court of Appeals for the District of Columbia:

“I think the judgment below should be reversed and the action dismissed for improper venue. The suit is based on diversity of citizenship and was not brought in the district of the residence of either the plaintiff or the defendant, and nothing in the nature of a waiver is shown, as in the case of *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165 (1939). The cause of action arose on a military reservation belonging to the United States and over which the United States had and exercised “entire jurisdiction,” and which by the act of cession Virginia had put beyond the field of the operation of her law.”

## POINT III

**It Was Error for the Courts Below to Hold That as a Matter of Law Petitioner Operated the Hotel, and to Exclude from the Jury Evidence in Re Petitioner's Non-Operation.**

The majority of the Circuit Court of Appeals below, in its opinion (157-8) specified the following as the important questions to be decided:

"The most important question before us is that relating to venue. \* \* \* Plaintiff contends that the venue is proper because the defendant, by *doing business within the State of Virginia*, has consented to the suit and service of process there under applicable Virginia statute *and has waived venue* as to cases instituted against it in the federal courts of that state. \* \* \*

"The first contention of defendant, which is basic not only on this question of venue, but also on the question of negligence, later to be considered, is that it was not operating the hotel at all, and hence was not doing business in such way as to subject it to service of process under the Virginia statute or render it liable in connection with the fire that occurred. \* \* \* There is nothing to this contention. The *evidence* shows conclusively that plaintiff was operating the hotel \* \* \* " (*Italics supplied*).

The last sentence quoted deserves to be examined carefully, because it forms the keystone of the majority opinion. On this premise that the *evidence* shows conclusively that petitioner operated the hotel, the entire opinion is based.

How the majority of the Circuit Court of Appeals could have reached the conclusion that the *evidence* showed petitioner to be the operator of the hotel is really a mystery. During the trial of the case petitioner tried to introduce evidence that petitioner did not operate the hotel and that in fact the hotel was operated by the Navy "lock, stock and

barrel." Plaintiff's counsel strenuously resisted every effort made by petitioners to introduce this evidence, and for a long time the trial court refused to permit petitioner to introduce any evidence on this issue, holding that the court had already ruled *prior to the trial that as a matter of law petitioner was the operator of the hotel* (R. 15, 17, 56, 74). Finally, at the insistence of petitioner, the trial court, to vouch for the record and for no other purpose, permitted petitioner to introduce evidence on this issue, but refused to submit the issue to the jury, and instructed the jury that they could not consider such evidence, as the court had already ruled, as a matter of law, that the petitioner operated the hotel and was responsible for any negligence of the hotel employees (R. 56, 57). *Plaintiff's counsel did not introduce any testimony whatsoever on this basic issue, insisting that no oral testimony was admissible to alter or vary the terms of the written contract between petitioner and the U. S. Government. The only testimony in the record on this issue was that introduced by petitioner, which definitely and conclusively showed the United States Navy to be the sole operator of the hotel.* Lieutenant Charles S. Crocker, who was the United States Navy Officer in Charge, testified "the Navy ran the rotel, lock stock and barrel" (R. 51, 52). J. H. Shoemaker (R. 53) who was resident manager, testified, "I was employed by the United States Navy" and that he worked under the Navy Officer in Charge, Lieutenant Charles S. Crocker. Yearsley A. Price, Vice-President of petitioner, testified that petitioner only advised the Navy in connection with hotel operations and that the "No. 1 Boss" was Captain Bicklehaupt, U.S.N., and the "No. 2 Boss" was Lieutenant Crocker, U.S.N.R. (R. 66). Furthermore there was a sign prominently displayed

over the Clerk's desk in the lobby of the hotel reading "U. S. Hotel Chamberlin, owned and operated by the U. S. Navy" (R. 24). The majority opinion does not point out any evidence contrary to this evidence of petitioner, and it would be interesting to know just what evidence there is in the record to justify their statement that,

"The evidence shows conclusively that plaintiff was operating the hotel \* \* \*" (R. 158).

Quoad plaintiff's contention that oral testimony cannot be introduced to alter or vary the terms of a written instrument, we call attention to the numerous decisions holding that this rule applies only to the parties to the contract and does not apply *in re* a controversy between a party to the contract and a third party. (See 32 *Corpus Juris, Secundum*, Sec. 861, Evidence, and cases there cited. Also *Gulf Refining Co. v. Brown*, 93 Fed (2d) 870 (C.C.A. 4, 1938). Furthermore, by the terms of the contract itself this evidence was clearly admissible, because Article 12 of the contract (R. 10) reads as follows:

*"The Government reserves the right at any time to furnish any of the services, materials, articles, supplies or equipment contemplated by the contract."*

Petitioner clearly had the right to prove that the Government had, in fact, exercised this reservation, and we earnestly submit that it was error for the court to refuse to consider this evidence, or to exclude it from the jury's consideration.

### Conclusion

For the reasons set out in the petition for a writ of certiorari, *supra*, and reasons set out herein, the writ of certi-

orari should be granted to the United States Court of Appeals for the fourth circuit in this case.

Respectfully submitted,

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(2335)

THE KNOTT CASE

MARY HALE FURMAN

Respondent

BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF HABEAS CORPUS

EDWARD R. BARR,

GEORGE M. LANNING,

Counsel for Respondent

THE NATIONAL BUREAU OF INVESTIGATION, U. S. DEPT. OF JUSTICE

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1947

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**No. 339**

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THE KNOTT CORPORATION,  
*Petitioner,*

v.

MARY HALE FURMAN,  
*Respondent*

---

**BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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**OPINIONS BELOW**

The District Court did not render an opinion in the case. The opinion of the Circuit Court of Appeals, as yet unpublished, may be found in the record at p. 157.

**JURISDICTION**

The order denying rehearing in the Circuit Court of Appeals was entered on August 13, 1947. The petition for writ of certiorari was filed on or before September 17, 1947. The jurisdiction of this court is sought to be invoked under section 240 of the Judicial Code, as amended.

### STATEMENT

Mrs. Mary Hale Furman, wife of a Naval officer, was sojourning with her husband in the Chamberlin Hotel at Old Point Comfort, Virginia. He was about to sail for the Pacific, and their stay was necessarily to be brief. In March of 1945 the war was at its height with the Japanese.

For generations "The Chamberlin" has been a watering spot of distinction in this part of the country. It is situated within the Fortress Monroe military reservation and the present building was constructed under a long-term lease with the government. When war broke out the leasehold was condemned and the hotel thereupon operated under the jurisdiction of the Navy Department, primarily for the benefit of officers attached to ships temporarily in Hampton Roads (as was the case with Lt. Furman). To manage and operate this 300-room hotel and its sundry concessions, the Navy contracted (R. p. 1) with the petitioner corporation on a fixed fee basis. The company brought down a manager and assistant from New York, employed a staff of 293 people, and its operation soon showed a handsome profit to the government. The Knott Corporation is a specialist in the field and owns and operates a number of other hotels, including one or more for the Navy elsewhere.

The Furmans were aroused in the middle of the night by a sensation of suffocating. Fire of unknown proportions had already filled their room with smoke and choked the passageway outside. Mrs. Furman was pregnant; they tied wet towels around their faces, she standing by the window for air while her husband reconnoitered the corridor. After repeated attempts to feel his way in the darkness, Lt. Furman advised his

wife that the hall was "impassable". It became painfully evident they had been left alone in their wing of the building. Cries and muffled noises in the offing added to their feeling of abandonment. In the appalling necessity of having to do something, the Furmans decided that the best escape was to lower themselves out of the window to a roof three floors, or 32 feet, below.

The rope of bedsheets, anchored to a radiator, tore in two at the middle of the second sheet and sent Mrs. Furman to a shocking, painful fall. The seriousness of her injuries and the adequacy of the \$27,000 verdict are literally the only points in the case over which there was no contest.

It is unnecessary to outline in this brief the slipshod performance in hotel management which brought about all of this unnecessary injury and suffering. Suffice it to say that on each of the six counts of negligence, the record was replete with evidence; so much so, in fact, that we were hopeful the Circuit Court of Appeals would lay down some pronouncement of benefit to the harassed hotel-going public. In its revelation of incompetence and indifference on the part of presumably enlightened hotel management, the case hardly had a counterpart.

### **ARGUMENT**

#### **1. The Alleged Error Presents No Justiciable Controversy Within the Purview of the Appellate Jurisdiction of This Court**

The petitioner, it will be observed, is seeking to invoke the jurisdiction of the Supreme Court in an ordinary personal injury action. The only possible contention of which this court could take cognizance concerns its suability in the district court below. The ques-

tion is one of venue, and arises by reason of government ownership of the reservation on which Mrs. Furman was injured.

Mrs. Furman was a citizen of Massachusetts, the defendant (petitioner) was a Delaware corporation, and the suit was brought in the Eastern District of Virginia wherein the corporation did business and gave rise to the cause of action. Process was served not only upon the corporation's resident manager who was found on the premises, but also upon the Secretary of the Commonwealth pursuant to the statute (Virginia Code, 1942, as amended, section 3846a) compelling foreign corporations to submit to suit on causes of action arising out of local business.

The act of cession authorizing the establishment of Fort Monroe reserved to the state among other things the right to "execute any process" therein. The operator of the Chamberlin Hotel was thus subject to suit by Mrs. Furman in the state court and, save for a question of venue, in the district court as well. Cf. *N. & P. Belt Line R.R. Co. v. Parker, et al.* (1929), 152 Va. 484, 147 S. E. 461. It could, unquestionably, have removed this action from a state court. A resident guest injured in the same fire could admittedly have proceeded against the corporation in the very same district court. The petitioner is accordingly in the awkward position of asserting a special immunity, governing only this one particular situation. The contention is made to appear that state law is not applicable in the reservation and hence venue on causes of action arising therein is not waived. The question whether the statute under which process was served herein is efficacious in the reservation, turns upon its proper construction with the 1820 act of cession. That act is a peculiar one, differing

from all others, and in a limited sense only does the point involve the concurrency of Virginia's jurisdiction over Old Point Comfort.

It helps the petitioner's case not one whit to cite a variety of tax cases and make the bold assertion that they are in conflict with the decisions of the district and circuit courts herein. Nor is there any help from—much less conflict in—other decisions which simply protect undomesticated foreign corporations from suit indiscriminately of where causes of action arise. Furthermore, it is entirely consistent in this situation for the Supreme Court of Appeals of Virginia to have declared the self-evident proposition that a soldier transferred to duty at Fort Monroe does not thereby lose his "citizenship" or domicile.

The proper construction of Virginia's act ceding Fort Monroe must admittedly be one of remote interest either to lawyer or layman. Especially so, when one considers that the act of cession has been construed for over fifty years to mean that the general civil laws of the Commonwealth run in Fort Monroe. Ever since our mechanics lien laws were applied to the Chamberlin Hotel in 1893, the case of *Crook, Horner & Co. v. Old Point Comfort Hotel Co.*, 54 Fed. 604, has established as accepted law in this jurisdiction the principle that the Commonwealth of Virginia has retained concurrent civil jurisdiction with the government over Fort Monroe.

The petition, accordingly, presents merely a question of overturning settled, local procedural law—in no wise contradictory of other decisions—on a point of extremely limited value as a precedent in Virginia and virtually none elsewhere.

## 2. The Question of Venue Was Not Properly Raised

So much emphasis is now placed on the question of venue that it is appropriate to consider how the issue was originally raised.

The complaint (R. p. 93) charged the defendant with operating the Chamberlin Hotel at Old Point, "and otherwise doing, transacting and maintaining a place of business within the State of Virginia and this District". The plea, by motion, studiously avoided a denial (R. p. 13), *merely asserting that the cause of action arose on a federal reservation*. It did not even counter the common sense proposition that the operation of an eight-story hotel could hardly be a self-sufficient and self-sustaining process, carried on only within and upon itself and not extending over into the state proper.

We did not know, and still do not know, whether this defendant is operating another hotel at Virginia Beach or, perhaps, Richmond. But we do observe, from its operating agreement, that all of the corporation's contracts for supplies, all of its purchases of foods, its required traveling back and forth monthly between New York and Old Point (R. p. 5), its checking account in the Bank of Phoebus (outside the Reservation), its operation of such adjuncts as laundries, employment offices, rental agencies and so on, must have carried its affairs in no inconsiderable degree over into the state at large and, for that matter, constantly across state lines.

Bottomed on such a plea, the petitioner corporation is quite unable to avail itself of authorities such as *Ohio River Contract Co. v. Gordon* (1917), 244 U. S. 68; and *Sollit & Sons Const. Co. v. Commonwealth*

(1934), 161 Va. 854, 172 S. E. 290. The question of venue thus reaches the court in a most unsatisfactory and inconclusive manner.

### **3. The Virginia Statute Authorizing Substituted Service on Foreign Corporations Necessarily Works a Waiver of Federal Venue**

Code section 3846a (see Michie's 1946 Cumulative Supplement to the Virginia Code of 1942) provides that a foreign corporation doing business in the state must appoint the Secretary of the Commonwealth "its true and lawful attorney for the purposes hereinafter stated" or, failing to file such power of attorney, will be deemed by doing such business to have made the appointment "for the purposes hereinafter set forth."

As counsel ask, what are those purposes?

The statute, it is well to bear in mind, is limited in operation. It only purports to authorize the Secretary of the Commonwealth to act as process agent for foreign corporations *in suits arising out of their local business*. In other words, assuming a Delaware corporation enters Virginia and does business and files the requisite power of attorney, the Secretary of the Commonwealth is still not its process agent for causes of action arising in Delaware. It cannot be sued, via the Secretary of the Commonwealth, on actions unconnected with its local business. This feature recognizes the established rule protecting corporations such as railroads against the embarrassment of standing suit long distant from the *locus in quo*.

There was no appointment of a statutory process agent, hence no consent to be sued, either express or implied, in *Moss v. Atlantic Coast Line R.R. Co.*, 147 Fed. (2d) 701; *Cummer-Graham Co. v. Straight Side*

Basket Corp., 136 Fed. (2d) 328; and Robinson v. Coos Bay Pulp Corp., 137 Fed. (2d) 512. Even if the Circuit Court of Appeals in those cases had before them automatic appointment statutes such as Virginia's (which, of course, they did not) they still would have been unable to sustain the venue because the causes of action were not local but arose beyond the jurisdiction of each respective court.

Counsel's argument respecting waiver of removal apparently proceeds out of a misapprehension of the decisions such as *Neirbo & Co. et al v. Bethlehem Shipbuilding Corp., Ltd.*, 308 U. S. 165. If a foreign corporation consents to be sued in a state court, they argue, it must be held to have waived the right to remove out of that court. But the difficulty with the theory lies in the fact that consent to be sued in the courts of the state has already been construed to include federal as well as state courts sitting in the locality. See the *Neirbo* case, *supra*, at page 171, which puts the proposition at rest.

The removal privilege is obviously the opposite of a venue privilege. The jurisdictional elements must be present, and no state statute, we should suppose, could force a litigant to release his right to exercise the federal jurisdiction. Such an exaction, if intended, would be clearly void. Removal presupposes federal jurisdiction and acquiescence in its exercise in the court of the remover's choice. It is, of course, exclusively the recourse of a defendant.

All that the *Neirbo* case means is that a foreign corporation which consents under state law to local suit has no more reason to object to such suit in the federal court than it has in the state court. This is hardly inconsistent with the earlier pronouncement of the court

in Louisville etc. R. Co. v. Chatters, 279 U. S. 320, 324 as follows:

"A foreign corporation is amenable to suit to enforce a personal liability if it is doing business within the jurisdiction in such manner and to such extent as to warrant the inference that it is present there (Citing cases). Even when present and amenable to suit it may not, unless it has consented (citing cases), be sued on transitory causes of action arising elsewhere *which are unconnected with any corporate action by it within the jurisdiction* (Citing cases)". (Italics ours).

A practical construction of the statute should prevail: so long as it is possible for a state to compel a foreign corporation to submit to local suit on local business via a local process agent, it must follow from such corporation's right of removal to the federal court that there is no sound reason for exempting it from the jurisdiction of that court at the outset.

Beyond the foregoing there is little to add to the Circuit Court of Appeals' careful analysis of the statute in question. It would seem that if it is lawful for a state to exact the consent of a foreign corporation to be sued, the mechanics employed for judicially recognizing that consent are immaterial for the purposes of this case. The important point is whether the corporation may be deemed to have consented: it may do so by conduct just as well as by express act, and the legislature was entirely competent to choose the method by which its consent or lack of consent is to be measured and determined.

#### **4. Virginia Has Retained Concurrent Civil Jurisdiction Over Fort Monroe**

We have already seen that this proposition was judicially enunciated more than fifty years ago in *Crook, Horner & Co. v. Old Point Comfort Hotel Company*, *supra*. That case has been carried forward and quoted as authority in each subsequent edition of the Code of Virginia (see Michie's Code 1942, sec. 17). The corporation at bar must, therefore, be held to an awareness of this construction of the law when it entered the Reservation. Indeed, quite irrespective of the circumscribed nature of the act of cession, when one considers how many state laws have been made to extend into federal reservations by express congressional mandate, it is difficult to conceive how any governmental authority could be considered as having an absolute sovereignty over Fort Monroe.

Recent trends of thought, furthermore, are definitely away from the anachronistic concept of a necessity for exclusive jurisdiction dwelling in the United States. See *James v. Dravo Contracting Co.*, 302 U. S. 134. Modern decisions and statutes even go so far as to condition the acceptance of such jurisdiction on the express assent of a governmental department head. Compare *Silas Mason Co. v. Tax Commr.*, 302 U. S. 186, 197. The *Crook, Horner* case accordingly fits in with the advanced, practical rule of construction now applied by the courts.

The Commonwealth's intentions respecting jurisdiction over federal reservations are clearly revealed in the general statute which was in existence at the time the *Chamberlin Hotel* lease was condemned. Virginia Code, sec. 19:

“\* \* \* For all purposes of taxation and of the jurisdiction of the courts of Virginia over persons, transactions, matters and property on said land, the said lands shall be deemed to be a part of the county or city in which they are located.”

An act (Virginia Laws, 1918, page 568) which ceded exclusive jurisdiction over lands acquired from private owners during the first world war, was repealed in 1936 (Virginia Laws, 1936, page 610), consistently with the state's announced policy of retaining all practical control over government reservations so long as the federal use thereof is not affected.

It may be of interest to note that the implications of the Crook, Horner & Co. case were so much feared in 1922 that the Virginia legislature was petitioned to suspend the reverter clause for the duration of another private lease of the Chamberlin (Virginia Laws, 1922, page 19). That lease having since been condemned out of existence, the suspension is pertinent now only in revealing how both government and state looked upon their respective rights in the Reservation.

Judge Hughes, we think, accurately rationalized the situation in the Crook, Horner case. It is not necessary, however, to go all the way with Judge Hughes in the limited issue of state jurisdiction before us. Our question may be boiled down to the inquiry whether the Virginia statute providing a method for substituted service of process on a foreign corporation extends into an area wherein it is subject to direct process. A corporation in Fort Monroe being amenable to manual service, is there anything in the act of cession to inhibit its amenability to substituted service? We do not think there is, as otherwise the expression “doing business in Virginia” as employed in the statute could not convey

the meaning of doing business everywhere within the reach of Virginia courts.

Far from creating a legal vacuum or void, Judge Hughes thought the act of cession contained (opinion, p. 609) "quite a number of very material limitations of the power of the United States over the land at Old Point Comfort, and provide(s) expressly for the reversion of the land to this Commonwealth, \* \* \*". It was impossible for him to conclude that the parties to the transaction of cession intended to isolate Fortress Monroe. Indeed, it would be a most arbitrary construction of the general language "execute *any* process" to deny that Virginia retained the right to serve all manner of persons with all manner of process in Fort Monroe. Judge Hughes would have been obliged to hold, hence, that a foreign corporation migrating into the area knowingly entangled itself with all the procedural laws respecting its suability in local courts.

If Virginia's civil jurisdiction over Fort Monroe is concurrent to the extent that its mechanics lien laws apply to the construction of the Chamberlin, as they did, we fail to see any menace to the government in treating her process laws as applicable by the same token to the private operator of the Chamberlin. Neither law in any sense regulates or imposes burdens on the Fort, or the government. That, we believe, is the criterion by which all courts are coming to rationalize the maze of decisions dealing with the subject of jurisdiction over federal reservations.

**5. By Reserving the Right to Execute Process in Fort Monroe, Virginia Enabled Herself to Legislate Upon the Legal Effect of Service on Persons "Found" There**

In approaching this question we at once put aside any notion that process serving in Fort Monroe is a matter of concern to the United States. The government has expressly agreed to permit it to be done therein. Nor can it be claimed that a statutory method of effecting service which does not involve physical entry or act in the reservation interferes with the military uses of the property. This is not a case where local regulations or taxes are sought to be interposed against the peace and dignity of the government; rather is it an eminently practical situation of determining just how far state law controls in a matter of exclusive state concern. And we say exclusive state concern, pointedly: can the United States as owner of Fort Monroe have any conceivable interest in the *locality* of suit against private tort feorsors therein?

The operation of this hotel obliged the corporation to pay income taxes to the State of Virginia as well as unemployment compensation contributions and benefits (R. p. 97). Title 16, U. S. Code Annotated, sec. 457 provides that in actions for personal injuries sustained on places over which the government's jurisdiction is exclusive, "the rights of the parties shall be governed by the laws of the state within the exterior boundaries of which it may be." State criminal laws now define offenses punishable in the Reservation (18 USCA sec. 468), and state taxes must be paid on sales of motor vehicle fuels therein (4 USCA secs. 12-18). There are almost innumerable other instances in which local laws have a highly practical application on private persons

in governmental reservations. Not the least of which laws, we submit, is that exposing to civil suit persons physically present and doing business in Fort Monroe.

The right to serve process in Fort Monroe means nothing, of course, if nobody is in the reservation. It is only when a potential defendant enters the fort that the right to serve process assumes significance. When a natural person crosses over the line there can hardly be any dispute over his physical presence there: he is his own monument to amenability to process. When an artificial person, however, enters the reservation its presence is to be gauged by the standard of whether it is "doing business" therein.

That standard has come to have a definite meaning in corporation law. Occasional transactions, we know, do not constitute doing business. It is only when a corporation is active enough to warrant the pragmatic inference of its existence in a given locality that the courts have unanimously said it may be "found" there.

Virginia having the right to serve a corporation "found" in Fort Monroe, her courts necessarily have the right to make a judicial determination on the facts touching its existence or non-existence therein. The right of a court to inquire whether its process server has or has not accomplished what his return speaks, can hardly be denied.

By being physically present and "found" in Fort Monroe, a person thus becomes liable to the different methods of service of process enacted by state statute. The statute governing substituted service on an individual (on a man's wife at home, for instance) parallels the legislation which provides for substituted service on corporations (on certain designated agents such as the Secretary of the Commonwealth, for instance). These

statutes ought to be just as efficacious in Fort Monroe as they are in any other locality wherein a county sheriff or city sergeant may step. So long as the requirements are founded on the same act by which a person subjects himself to suit by direct service, namely, the act of being present and "found", there is no legal differentiation between the different mechanical means of summoning persons into court.

The determinative consideration, we submit, is whether this corporation was found within the jurisdiction of a state process server, and this necessarily presupposes the right in the court to decide whether it was legally served. For the heart of the question is not whether the corporation at bar was doing business in Virginia proper, but is whether it migrated into an area in which Virginia may determine that it was subject to suit for what it does or omits to do there. If a corporation has left the domicile of its existence and traveled across state lines into a legal non-entity, that is one thing; on the other hand, if it comes within a state and sets up in business in an area wherein it is as amenable to state process as any other corporation, it is impossible to give effect to one Virginia statute governing service of process without giving effect to the others. That the corporation at bar waived venue depends, not upon whom it injured, but upon whether by doing business it has demonstrated its presence and agreeableness to local process in accordance with local formula.

It must be taken, therefore, that it was within the realm of the Commonwealth's reserved powers to say how and in what manner an *in personam* judgment could be rendered against people in Fort Monroe. The retention of the right to go on the Reservation gave

Virginia jurisdiction over the person of potential defendants found therein. It is perfectly true that those persons are not exposed to state liquor laws, direct taxes or regulatory measures, but for purposes of service of process the right of entry into Fortress Monroe makes it as much a part of Virginia as the balance of the state. To hold otherwise would fasten immunity where none was intended and upset the established practice of every court in the vicinity of Fort Monroe. There is every valid reason to conclude, therefore, that the area was not intended to provide tortfeasors with a hiding place from suit.

**6. "Doing Business in Virginia" for Process Purposes Means Doing Business Anywhere That Process May Be Served Within the Geographical Limits of the State**

We do not see how it can be sensibly argued that Virginia, by using the unqualified expression "doing business in the state" in a process statute, intended to exclude any part of its geography. Nor can there be read into the expression any indication of Virginia's desire to exempt areas in which it is admitted and established that her process runs.

If the legislature is to be taken as knowingly and intentionally treating federal reservations as no part of the state, how then could Virginia commence to enforce its unemployment compensation laws therein pursuant to mere consent and permission from Congress?

*"The terms 'in this state' and 'within this state' as here used obviously mean within the geographical limits of the state. The park is within those limits, and the area comprising the park is not by such terms excluded from the other areas where*

*the tax is obviously applicable.*" (Italics added).  
(*Ranier Nat'l Park Co. v. Martin*, 18 F. S. 481,  
affd. *per curiam* 302 U. S. 661).

*Kiker v. City of Philadelphia* (1943), 346 Pa. 624,  
31 A. (2d) 289, 297:

"\* \* \* Plaintiff argues that the phrase of the ordinance 'in Philadelphia' excluded League Island because it is not within Philadelphia. This contention is without merit, for obviously that phrase was intended to mean within the geographical limits of that City. As is clearly shown by the Act of February 2, 1854, P. L. 21 (incorporating the City) and the statutes granting consent to its purchase and ceding jurisdiction over League Island, as well as the Federal government's Certificate of Acceptance thereof, the reservation is within the City's territorial boundaries, and the area comprising the island is not, by the phrase 'in Philadelphia' excluded from the rest of the City where the tax is clearly applicable. See *Rainier Nat. Park Co. v. Martin*, D. C., 18 F. Supp. 481, affirmed 302 U. S. 661, 58 S. Ct. 478, 82 L. Ed 511; *Standard Oil Co. v. California*, supra, 291 U. S. page 243, 54 S. Ct. 381, 78 L. Ed. 775. The averments of plaintiff's bill that League Island is not a part of Philadelphia and that it is wholly outside the political jurisdiction and sovereignty of the Commonwealth of Pennsylvania are not allegations of fact, but rather conclusions of law, which need not be accepted as true by the Court in considering the sufficiency of the bill: *Commonwealth ex rel. Davis v. Blume*, 307 Pa. 406, 161 A. 551."

It ill behooves a Delaware corporation, migrating into Old Point Comfort, to claim that it was not doing business in Virginia. True, Virginia could not have forbid its entry on a federal reservation, but not even

the government could object, as we have seen, to the condition that it do so on pains of being treated alike with every other foreign company insofar as local suit for local torts is concerned. This corporation's government contract certainly gave it no special virtue over and beyond any other hotel operator in the state with whom it was competing. Clearly, the point of immunity is a technical or paper one, resting exclusively in the mind of counsel. Realistically speaking, anyone who has ever heard of the place will swear that Fortress Monroe is "in Virginia".

#### **7. The Dissenting Opinion Proceeds on Mistaken Concepts of the Case**

Judge Groner seemed to think that a question of federal jurisdiction was involved, and speaks in terms of "nullifying the positive jurisdictional limitation of the federal statute". But the issue is manifestly one of venue, as this court as long ago as 1877 made plain (*Ex parte Schollenberger*, 96 U. S. 369, 378):

"\* \* \* The Act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented. Here, the defendant companies have provided that they can be found in a district other than in which they reside, if a particular mode of proceeding is adopted, and they have been so found. In our opinion, therefore, the Circuit Court has jurisdiction of the causes, and should proceed to hear and decide them."

Even so, Judge Groner feared the decision might spell out the subjection of federal procedure to the requirements of state law. It is perfectly well settled, however, by the identical authority that local laws may have their effect upon federal venue. Said Mr. Chief Justice Waite, in the same case (p. 377) :

"States cannot by their legislation confer jurisdiction upon the courts of the United States, neither can consent of parties give jurisdiction when the facts do not; but both State legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case. *Ex parte McNeil*, 13 Wall. 236. \* \* \* So, as in this case, if the legislature of a State requires a foreign corporation to consent to be 'found' within its territory (*sic*), for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the jurisdiction, notwithstanding the finding was procured by consent. The essential fact is the finding, beyond which the court will not ordinarily look."

The same finding, over the course of years since the Schollenberger decision, has come to be based on principles of waiver, implied, rather than a literal consent to submit to the jurisdiction of a federal court. See the *Nierbo* case, *supra*, at page 175, as well as cases cited in the Circuit Court of Appeals' opinion at R. pp. 161-2.

In evaluating the case Judge Groner did not, we think, carry to its logical and sensible conclusion the salient factor that any person in Fort Monroe—be he an individual or domestic or foreign corporation—is subject to process in all courts, state or federal.

*Ex parte Schollenberger*, supra, p. 377:

"As the company, if sued in a State court, could remove the cause to the Circuit Court, and thus compel a citizen of the State to submit to that jurisdiction, we see no reason why the citizen may not, if he desires it, bring the company into the same jurisdiction at the outset. While the Circuit Court may not be technically a court of the Commonwealth, it is a court within it; and that, as we think, is all the legislature intended to provide for."

All of the reasons for presuming a waiver thus exist in the case at bar.

To Judge Groner, however, it seemed inconsistent that a state statute should have any effect whatsoever in an area over which the government had "exclusive" jurisdiction.

We have already adverted to the innumerable ways in which state laws actually touched on this corporation's operation of the Chamberlin. It seems ironical, therefore, to describe the government's jurisdiction over Old Point as "exclusive". In limited situations it still could be so classified—where state law might interfere with federal use—but when one reaches down into the bottom drawer of process serving, no rhyme or reason can be perceived to make the government's legislative authority exclusive. Rather does every practical consideration exist in favor of allowing the act of cession to mean what it says and provide a concurrent jurisdiction for process serving purposes.

The dissenting opinion, therefore, cannot but fallaciously import (1) a question of jurisdiction into the case, (2) qualms over the subjugation of federal procedure to state law, and (3) an exclusive right or juris-

diction vested in the United States to serve process in Fort Monroe.

### **CONCLUSION**

We would submit, therefore, that there is the highest authority—and sound, practical reason—for the contrary of every proposition advanced in the petition for certiorari and brief.

Justice has been eminently satisfied in this case, and it should not be disturbed.

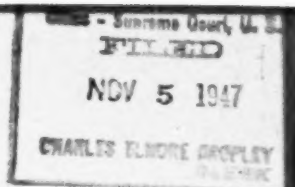
Respectfully,

EDWARD R. BAIRD,

GEORGE M. LANNING,

*Counsel for Respondent*

FILE COPY



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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No. 339

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THE KNOTT CORPORATION,

*Petitioner,*

*vs.*

MARY HALE FURMAN.

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PETITION FOR REHEARING

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THE KNOTT CORPORATION,

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**PETITION FOR REHEARING**

Comes now the above named, The Knott Corporation, a corporation, and presents this its petition for a rehearing of its application for a writ of certiorari which this court denied on October 27, 1947, and in support of this application for a rehearing, respectfully shows:

*First:* Petitioner believes that this Court, in denying the foregoing petition for a writ of certiorari, overlooked the fact that the decision of the majority of the Circuit Court of Appeals below held that doing business wholly and solely within the confines of the United States Military Reservation known as Fortress Monroe was doing business in the State of Virginia, and that doing business wholly and solely within said United States Military Reservation subjected petitioner to the jurisdiction of the laws of the State of Virginia. Notwithstanding that this ruling is directly

opposed to the decisions of the United States Supreme Court in the cases of:

*Standard Oil Co. v. California*, 291 U. S. 242 (1934);  
*United States v. Unzenta*, 281 U. S. 138 (1930);  
*Arlington Hotel Co. v. Fant*, — U. S. 278, 439 (1929);  
*Pacific Coast Dairy v. Dept. of Agriculture of California*, — U. S. 318, 285 (1943);  
*Stewart & Co. v. Sadrakula*, — U. S. 309, 84 (1940);  
*Collins v. Yosemite Park Co.*, — U. S. 304, 518 (1938);  
*Murray v. Gerrick*, — U. S. 291, 315 (1934),

and the fact that the majority of the Circuit Court of Appeals below had its attention directed to the decisions, *supra*, of the United States Supreme Court, the majority of the Court below failed to comment on or in any way to distinguish the facts in petitioner's case from those in the cases *supra*.

*Second:* The specific law of the State of Virginia which the majority of the Circuit Court of Appeals below held that petitioner was subject to by virtue of doing business on the United States Reservation is Section 3846 (a) of the Virginia Code of 1942. This statute, as indicated in the petition for a writ of certiorari, is designed to subject a foreign corporation to service by serving process on the Secretary of the Commonwealth of the State of Virginia as the statutory agent of the foreign corporation, and for that purpose only. It provides that a corporation which shall do business in the State of Virginia without having appointed the Secretary of the Commonwealth its true and lawful attorney as required by state statute, “\* \* \* shall by doing such business in the State of Virginia be deemed

to have thereby appointed the Secretary of the Commonwealth its true and lawful attorney for the purposes hereinafter set forth." The purposes mentioned above are by the express provisions of the statute limited to "• • • the same legal force and validity as if served upon it in the State of Virginia."

We submit that this Court in denying the petition for a writ of certiorari has overlooked the fact that doing business wholly and solely on a Government Reservation was not a doing business in the State of Virginia, and that therefore, the Virginia statute, *supra*, could have no application to petitioner who had never in any way transacted any business in the State of Virginia, unless doing business on the United States Fortress Monroe Military Reservation can be deemed to be doing business in the State of Virginia.

We further submit that this Court has overlooked the fact that the Virginia statute, *supra*, only provides that the service of process on the Secretary of the Commonwealth as in the statute provided, is limited to the legal effect of the service of process in the State of Virginia. That statute provides for no waiver of venue whatsoever, and the majority of the Circuit Court of Appeals below failed to comment on, and apparently overlooked the significance of the legal effect of such service of process, and has definitely erred in ruling that service under the Virginia statute, *supra*, had the effect of a waiver of venue by petitioner.

For the foregoing reasons it is respectfully urged that this petition for a re-hearing be granted and the judgment of the District Court of the United States for the Eastern

District of Virginia be, upon further consideration, reversed.

Respectfully submitted,

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*Counsel for Petitioner,*  
*Citizens Bank Building,*  
*Norfolk, Virginia;*

By JOHN W. OAST, JR.

*Certificate of Counsel*

I, John W. Oast, Jr., of counsel, do hereby certify that the foregoing petition for a re-hearing of this cause is presented in good faith and not for delay.

JOHN W. OAST, JR.,  
*Of Counsel for*  
*The Knott Corporation.*

(3220)

